

**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

<b>In the Matter of:</b>	)	<b>Docket No. 98-SIT-3</b>
	)	
<b>Three Mountain Power, LLC</b>	)	<b>COMMITTEE PROPOSED DECISION</b>
<b>Petition for Jurisdictional Determination</b>	)	<b>RE: NOI EXEMPTION</b>
	)	
_____	)	

**I. THE PROJECT**

Three Mountain Power, LLC (Petitioner) proposes to construct and operate a 500 megawatt (MW) natural gas-fired combined cycle power plant that is a market-based response to the creation of the California Power Exchange (PX). The proposed project will be located in Shasta County, approximately 53 miles northeast of the city of Redding and two miles northeast of the town of Burney. Petitioner will participate in the competitive electricity marketplace and expects to sell all or some of the project's electricity output through the PX.

**II. PROCEDURAL HISTORY**

On September 14, 1998, Petitioner filed a "Petition for Jurisdictional Determination" requesting that the Commission find its Three Mountain Power project eligible for an exemption from the Notice of Intention (NOI) requirements of Public Resources Code (PRC) section 25502. Petitioner asserts that its project conforms with the provisions of PRC, § 25540.6(a)(1) which exempts certain power plant projects from the NOI process.

By Notice dated October 19, 1998, the Energy Facility Siting Committee scheduled a hearing on November 10, 1998 to consider the Petition. In accord with Commission regulations,<sup>1</sup> the Committee served the Notice and Petition upon the individuals, organizations, and businesses identified by Petitioner as "interested parties," as well as upon other persons and entities appearing on other pertinent mailing lists. The Notice directed all entities wishing to participate

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<sup>1</sup> Cal. Code of Regs., tit. 20, § 1232.

in the proceeding to file written statements by November 5, 1998. The Notice also directed Petitioner to provide responses to several inquiries regarding its assertion that the proposed project qualifies for an NOI exemption. Petitioner timely filed its responses as sworn testimony. Commission Staff also filed a statement pursuant to the Notice. No other comments were filed.

On November 4, 1998, the Commission declared certain findings in the *Blythe Energy* Decision as precedential for NOI exemption proceedings.<sup>2</sup> In that Decision, the Commission also indicated that Petitions for NOI exemptions may be reviewed on the basis of sworn testimony in lieu of evidentiary hearings. Consequently, on November 10, 1998, the Committee issued a Notice canceling the November 10th evidentiary hearing on this Petition, and rescheduled the hearing before the full Commission at its Business Meeting on December 2, 1998.

On November 20, 1998, the Committee issued this Proposed Decision which is based on the sworn testimony filed by Petitioner, as well as the statement submitted by Staff. The Proposed Decision was served on Petitioner and all interested parties for review and comment prior to the Commission's December 2 hearing on the matter.

### **III. APPLICABLE LAW**

#### **A. Statutory Requirements.**

Public Resources Code section 25502 provides in pertinent part that:

Each person proposing to construct a thermal power plant...shall submit to the commission a notice of intention [NOI] to file an application for the certification of the site and related facility or facilities.<sup>3</sup>

The purpose of the NOI is to provide an open planning process in which the project proponent, interested agencies, and members of the public have an opportunity to review the principal environmental, public health and safety, socioeconomic, and technological advantages and disadvantages of potential sites for a proposed project. (Cal. Code of Regs., tit. 20, § 1721). The

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<sup>2</sup> Docket No. 98-SIT-2; CEC Publication No. P800-98-004.

<sup>3</sup> The Commission generally has 12 months from the time an NOI filing is accepted in which to conduct this review. (PRC, § 25516.6(a).)

NOI process also reviews whether a proposed project conforms with the Commission's assessment of electricity demand adopted pursuant to Section 25305 et seq. of the Public Resources Code. (PRC, § 25502).

Successful completion of the NOI process is a prerequisite to the second stage of power plant licensing, i.e., the Application for Certification (AFC). Public Resources Code section 25540.6, however, *exempts* certain projects from the NOI process and allows them to proceed directly to the AFC stage.<sup>4</sup> Projects eligible for this expedited licensing process include:

...a thermal power plant which is the result of a competitive solicitation or negotiation for new generation resources and will employ natural gas-fired technology... . (PRC, § 25540.6(a)(1).)<sup>5</sup>

Petitioner contends its proposed project fits within this provision.

## **B. Policy Guidance.**

The Commission has authority to interpret pertinent statutory or regulatory provisions. Typically, such Commission policy is expressed in its biennial Electricity Report (*ER*), the most recently adopted of which is controlling for power plant proposals filed during an *ER*'s operative life. (PRC, §§ 25309 and 25523(f)). In the present instance, this guidance appears as part of the 1996 *ER* in which the Commission stated:

For gas-fired power plants which are the result of competitive solicitations or negotiations, we will continue our process [announced in the Addendum to *ER 94*] for granting exemptions from NOI requirements to such projects. (*ER 96*, p. 75, Endnote 1).

The policy expressed in *ER 94* and the Addendum to *ER 94* supported the development of a competitive market in the production and sales of electricity. The Addendum clarified Commission policy on legislation amending Section 25540.6 to allow NOI exemptions for natural gas-fired projects that are "the result of a competitive solicitation or negotiation." (AB

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<sup>4</sup> The AFC process anticipates a *final* licensing decision within 12 months of filing an application. See, PRC, § 25540.6(a).

<sup>5</sup> PRC, § 25540.6 lists several specific NOI exemptions that include: cogeneration, solar, modification of a specific facility, less than 100 MW, and demonstration projects.

1884; Statutes of 1993).<sup>6</sup> In the Addendum, the Commission expressed its preference for a "...broad construction of what it means to be 'the result of a competitive solicitation or negotiation'."<sup>7</sup> In *ER 96*, the Commission expanded the views contained in *ER 94* and the *ER 94* Addendum to encourage the development of merchant power plants that participate in the newly emerging electricity marketplace without the benefit of ratepayer guarantees. (*ER 96* at pp. 71-72). Until the *Blythe Energy* Decision was issued, formal Commission policy on NOI exemptions was limited to these Electricity Reports.<sup>8</sup>

### C. Precedential Decision

In *Blythe Energy*, the Commission further interpreted the scope of its policies pertaining to NOI exemptions, and determined that a natural gas-fired merchant project which proposes to sell its power in the competitive electricity market, and does not put ratepayers at risk, would generally be eligible for an NOI exemption. The Commission declared the following Findings as *Precedent*:<sup>9</sup>

- 1) The Commission adopted an "Addendum to the 1994 Electricity Report" on February 14, 1996.
- 2) This Addendum sets forth policies and procedures which apply to the interpretation of Public Resources Code (PRC) section 25540.6(a)(1) and are, on a case-by-case basis, specifically applicable to individual Petitions seeking an exemption from the Notice of Intention (NOI) provisions of PRC, § 25502.
- 3) The Commission adopted the 1996 Electricity Report (*ER*) which continued the policies set forth in *ER 94* and in the Addendum.

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<sup>6</sup> The Legislative Counsel's Digest for AB 1884 states that the amendments were intended to change the statute to conform to the present-day competitive marketplace of energy development. "...[T]he siting provisions of the Act were written at a time when large baseload power plants were the types of plants being considered by the Commission and when competition between utilities and second party power producers was nonexistent." (Leg. Counsel's Digest, Bill Analysis for AB 1884, Third Reading, April 12, 1993). At the time AB 1884 was adopted, the federal Public Utilities Regulatory Policy Act (PURPA) and other related state laws had established a process (Biennial Plan Report Update or BRPU) to allow regulated public utilities and independent power producers to compete in the marketplace through a competitive bid process in order to meet demand. (*Ibid*; 8/27/93 Senate Analysis).

<sup>7</sup> *ER 94* Addendum, Revision 1, p. 2.

<sup>8</sup> See, *Blythe Energy*, pp 3-6 for a more complete discussion of the NOI exemption policies contained in *ER 94* and *ER 96*.

<sup>9</sup> *Blythe Energy*, pp. 18-19.

- 4) The California Power Exchange (PX) was created by AB 1890 to provide an efficient "competitive auction" open to all power producers, resulting in competitive market pricing at no risk to ratepayers. (Pub. Util. Code, § 355).
- 5) The creation of the PX, which promotes a competitive wholesale market, may be viewed as a continuing series of solicitations and negotiations, which are of the type reasonably envisioned by the policy expressed in the Addendum and PRC, § 25540.6(a)(1).
- 6) The PX market, which began the competitive auction on March 31 1998, replaced the solicitation process that existed under the Biennial Report Plan Update (BRPU).

In addition, the Commission found that power sales to the PX are the “result of a competitive solicitation or negotiation for new generation resources” within the meaning of PRC, § 25540.6(a)(1).<sup>10</sup> This finding includes natural gas-fired projects that sell power to other power exchanges and/or wholesale, and/or retail marketers, and/or direct access power markets, and/or other power consumers.<sup>11</sup>

#### IV. EVIDENCE OF RECORD

The *Blythe Energy* Decision provides that a Petitioner may establish eligibility for an NOI exemption by filing sworn testimony in response to certain specific inquiries enumerated in that Decision.<sup>12</sup> In consideration of the issues raised in the instant Petition, the Committee directed Petitioner to respond to those inquiries as follows:<sup>13</sup>

1. Does Petitioner contend that the PX process constitutes a “competitive solicitation or negotiation?” If so, on what basis?
2. Provide evidence to establish that Petitioner’s prospective project is “the *result* of a competitive solicitation or negotiation.”

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<sup>10</sup> Commission Order adopting *Blythe Energy* (Order No. 98-1104-04); see also, *Blythe Energy*, pp. 17-18.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*,fn. 27 at p. 18.

<sup>13</sup> See, October 19, 1998, Notice of Committee Hearing.

3. Describe the specific nexus between the particular project proposed by Petitioner and the PX's solicitations for "day ahead" and "hourly bids." How is the proposed project anticipated to perform under both scenarios?
4. Is it Petitioner's position that its proposal to develop a merchant power plant to sell energy through the PX creates an irrebuttable presumption that such proposal is the "result of a competitive solicitation or negotiation?"
5. Is Petitioner negotiating with any other potential power purchasers or power exchanges?
6. What is Petitioner's registration status at the PX? If Petitioner has not begun the registration process, what are Petitioner's plans regarding registration and negotiation for a "PX Participation Agreement?"
7. Identify Petitioner's principal corporate owners and/or other entities or individuals who are legally and financially responsible for the development, construction, and operation of the proposed project.
8. Describe Petitioner's experience and assets with regard to power generation acquisition, and power plant development, ownership, and operation.
9. Describe the specific location where the project will be constructed, and describe Petitioner's site selection criteria that led to this particular site location.
10. Provide evidence describing the project components sufficiently to establish that the proposed facility is a natural gas-fired power plant.
11. Provide evidence to establish that the proposed project can be developed and operated without the benefit of ratepayer support or guarantees.
12. Explain how Petitioner's negotiations will be affected by the Independent System Operator's "congestion" and "ancillary services" market activities.

Petitioner. Petitioner responded to the inquiries in its November 5, 1998, statement to the Committee. The responses were executed under penalty of perjury by Martin J. McFadden, Jr., Vice President of Three Mountain Power, LLC. Under *Blythe Energy*, responses that reflect the Commission's policy with regard to inquiries 1, 2, and 4 do not require further consideration. Regarding the remaining inquiries, the Committee reviewed the sworn responses as submitted by Petitioner in lieu of an evidentiary hearing, and based its Findings and Conclusions upon the evidence contained in that submittal.

Staff. Staff agreed with Petitioner's assertions that the proposed merchant project is a natural gas-fired power plant that meets the statutory test for being the result of a competitive solicitation. (Staff Statement filed November 3, 1998). Staff expressed its belief that existing Commission policy and previous NOI exemption cases support such a conclusion.<sup>14</sup> (*Ibid.*)

There were no other comments or other evidence filed in this matter.

## V. FINDINGS and CONCLUSIONS

Based upon the precedent established in *Blythe Energy*, and in the absence of any contravening evidence, the Committee finds that Petitioner's proposed project is the "result of a competitive solicitation or negotiation" within the meaning of PRC, § 25540.6(a)(1).

Based on the totality of the record, we make the following findings and conclusions:

- 1) Petitioner filed a Petition seeking an exemption from the Notice of Intention (NOI) process in accord with the policy guidance set forth in the *ER 94* Addendum, *ER 96*, and the *Blythe Energy* Decision, and in compliance with the requirements of Title 20, California Code of Regulations, sections 1230, et seq.
- 2) Petitioner is the wholly owned subsidiary of Ogden Power Corporation, an indirect subsidiary of Ogden Energy Group (Ogden Energy), a corporation headquartered in New Jersey, which is a subsidiary of Ogden Corporation, a \$1.5 billion dollar NYSE company headquartered in New York. Ogden Energy owns, leases, and/or operates power facilities throughout the world with a total output of approximately 1800 megawatts (MW) of electricity. Seventeen of Ogden Energy's facilities are located in California.
- 3) Petitioner proposes to construct a natural gas-fired combined cycle power plant, nominally rated at 500 MW. Major equipment within the power island includes: gas turbine generator sets and auxiliaries, a steam turbine generator set; heat recovery steam generators; and exhaust stacks equipped with air emissions control technology.
- 4) The power plant will be located in Shasta County, approximately 53 miles northeast of the city of Redding, and two miles northeast of the town of Burney, adjacent to and on the same parcel as an existing 10 MW waste wood-fueled power plant owned by Petitioner's indirect parent company, Ogden Energy.
- 5) Petitioner chose the site in Shasta County over ten alternative locations in California where Ogden Energy owns and operates other power plants. Petitioner's site selection

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<sup>14</sup> Staff cites the Commission's Decision in *La Paloma* and cases cited therein. (98-SIT-1; CEC Publication No. P800-98-003).

criteria included access to electric transmission and natural gas lines, availability of water, minimum environmental impact, and land use compliance.

- 6) Petitioner expects to deliver power to the Round Mountain and Cottonwood substations via existing 230 kV lines under the jurisdiction of the California Independent System Operator (ISO) and owned by Pacific Gas and Electric Company (PG&E) which will perform interconnection studies. The project expects to provide many of the ancillary services identified by the ISO including load following, voltage support, fast start, spinning reserve, and reserve margin through duct firing.
- 7) The development of Petitioner's proposed power plant as a merchant project does not put ratepayers at risk. Petitioner is not eligible for ratepayer support mechanisms from any source.
- 8) The proposed power plant project is a market-based response to the creation of the California Power Exchange (PX), and will be operated to sell some or all of its electricity output to the PX. The combined cycle project is capable of responding to both day-ahead and hour-ahead markets; it is expected for most of the year to operate on a daily basis, as a baseload plant.
- 9) Petitioner has access to the PX market through existing energy marketing firms which are registered with the PX or, in the alternative, Petitioner will sell power directly to the PX upon registration as a participant.

We conclude, therefore, that Petitioner's proposed natural gas-fired power plant project is the "result of competitive solicitation or negotiation" for the sale of its electric power. Under these circumstances, and in light of the findings reached above and factors discussed elsewhere in this Decision, and based on the precedent established in the *Blythe Energy* Decision, the Three Mountain Power Project qualifies for an exemption from the Notice of Intention as set forth in Public Resources Code section 25540.6(a)(1).

Dated: \_\_\_\_\_

ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

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ROBERT A. LAURIE  
Commissioner and Presiding Member  
Energy Facility Siting Committee

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DAVID A. ROHY, Ph.D.  
Vice Chair and Associate Member  
Energy Facility Siting Committee





## **APPENDIX A**

### **EVIDENCE OF RECORD**

**STATE OF CALIFORNIA**

**Energy Resources Conservation  
and Development Commission**

<b>In the Matter of</b>	)	
	)	<b>Docket No. 98-SIT-3</b>
<b>Three Mountain Power, LLC</b>	)	
<b>Request for Jurisdictional</b>	)	<b>COMMITTEE</b>
<b>PROPOSED</b>	)	
<b>Determination</b>	)	<b>DECISION</b>
_____	)	

**EVIDENCE OF RECORD**

<u>Date</u>	<u>Document</u>
September 14, 1998	Petition for Jurisdictional Determination filed by Three Mountain Power, LLC
November 3, 1998	Energy Commission Staff Statement filed by Energy Commission Staff
November 5, 1998	Responses to Energy Facility Siting Committee's Inquiries 1 through 12, filed by Three Mountain Power, LLC; Written testimony filed under penalty of perjury

## **APPENDIX B**

### **PROOF OF SERVICE LIST**